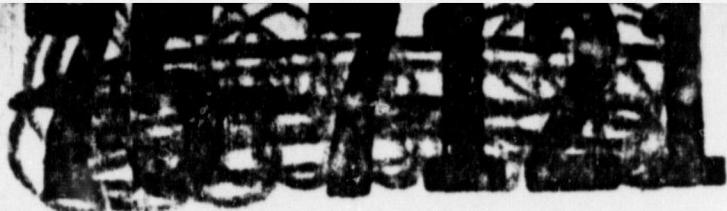


*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE



UNITED STATES COURT OF APPEALS



for the

SECOND CIRCUIT

75-7152

MARION ROSETTE,

Plaintiff-Appellee.

vs.

BPLS

RAINBO RECORD MANUFACTURING CORPORATION
and HAROLD E. MARKOWITZ and JACK BROWN, doing
business as RAINBO RECORD COMPANY, a partnership.

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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75-7121

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARION ROSETTE,

Plaintiff-Appellee,

vs.

RAINBO RECORD MANUFACTURING CORPORATION
and HAROLD E. MARKOWITZ and JACK BROWN,
doing business as RAINBO RECORD COMPANY, a
partnership,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-APPELLEE

Defendants here appeal the judgment rendered
by District Judge Henry F. Werker filed January 1,
1975 and entered February 4, 1975. The judgment
holds appellants Rainbo Record Manufacturing Company
and Jack Brown jointly and severally liable for copy-
right infringement of plaintiff's musical compositions
and awards her damages in the amount of \$14,300, with

interest from July 1, 1964, together with attorney's fees to be fixed and her costs and disbursements.

Plaintiff here cross-appeals the judgment insofar as it limits plaintiff's recovery for infringement of common law copyright by the manufacture of unauthorized phonograph recordings, to the period subsequent to the obtaining of statutory copyright and the filing of a notice of use.

The opinion of District Judge Murray I. Gurfein after trial of this action was rendered February 26, 1973 and is reported at 134 F. Supp. 1183 (S.D.N.Y. 1973) and at 177 U.S.P.Q. 631 (S.D.N.Y. 1973).

STATEMENT OF THE CASE

Marion Rosette ("Rosette") commenced this action for copyright infringement on November 15, 1966. She is a resident of New York and all defendants are residents of California.

The complaint alleges that the defendants, by the unauthorized manufacture of phonograph records, infringed her statutory copyright in 33 musical compositions and her common law copyright in 9 of those same compositions which were registered for copyright subsequent to the onset of the infringements.

The defendants' answer denies infringement, alleging that the musical compositions are in the public domain and that the action is time-barred by § 214 of the New York Civil Practice Law and Rules. At the trial, upon motion of defendants' counsel, the Court permitted defendants to plead as well the time limitation set forth in the Copyright Act, Title 17, U.S. Code, Section 115(b). Other affirmative defenses allowed defendants by the Court at trial were that Rosette had authorized mechanical reproduction of certain compositions prior to obtaining statutory copyright, thus barring a suit for infringement; that such authorized mechanical reproduction bars suit for infringement prior to filing of a notice of use; and that the Court did not have jurisdiction of the common law copyright claims.

The Court however denied defendants' motion to amend as to certain other affirmative defenses, a ruling which is the primary issue raised by defendants on this appeal.

The action was tried before District Judge Gurfein without jury on October 10 and 11, 1972.

Although finding no proof of infringement by defendant Markowitz (260 of the Appendix)* the Court found that there had been infringement by defendants Rainbo Record Manufacturing Corporation ("Rainbo") and Jack Brown ("Brown") (365a). Plaintiff was awarded treble damages but recovery was limited to infringements during the period "not time barred either by limitation or failure to file notice of use" (382a - 383a).

An interlocutory judgment was entered April 12, 1973 permanently restraining Rainbo and Brown from further infringement and ordering the appointment of Magistrate Martin D. Jacobs as Special Master to take evidence and compute damages. The hearing was held before Magistrate Jacobs on January 30 and 31, 1974. The Special Master's report of May 22, 1974 recommended judgment for plaintiff in the amount of \$14,300 with interest from July 1, 1964. This report was confirmed by Judge Gurfein and on February 4, 1975 the Judgment of Judge Werker, from which this appeal and cross-appeal are taken, was entered.

* References, unless otherwise specified are to pages of the Appendix.

STATEMENT OF FACTS

A. The Motion To Amend The Answer

At the start of trial defendants' counsel moved to amend the answer (67a) to plead nine additional affirmative defenses (there had been two pleaded in the answer). The Court, in its discretion, effectively allowed all but three of the proposed new defenses ruling that these three, the Eighth, Tenth and Eleventh affirmative defenses (89a), raise a claim of title inconsistent with plaintiff's claims (86a), that there was a definitive pre-trial order dated September 2, 1971 (85a), that the case was then six years old (86a), that plaintiff had not had an opportunity to meet the allegations (87a) and that the plaintiff would be prejudiced by the amendments (89a).

Defendants' counsel and the Court knew that plaintiff's counsel was leaving for vacation on September 7, 1972 and would return just before the trial was scheduled to begin, October 10, 1972 (83a).

Plaintiff's trial memorandum, findings of fact and

conclusions of law were filed when he left (83a). Defendants' counsel stated that he served the amended answer on September 15, 1972, only a week after plaintiff's counsel had left, knowing that plaintiff's counsel was away (90a). This service did not include the various papers supporting the affirmative defenses which defendants proposed to plead but were merely referred to in a memorandum of law (84a).

There was never any explanation by defendants' counsel why, prior to plaintiff's counsel's departure, a week before service, he did not at least orally advise plaintiff's counsel of the intention to amend and the nature of the amendments. Nor was it explained in testimony or otherwise why the defendants themselves were unaware of these affirmative defenses, if indeed they were unaware.

Plaintiff's counsel advised the Court that he was unfamiliar with the papers defendants wished to offer even though he had been counsel to plaintiff in the earlier case which had been settled without trial (84a). He also pointed out that none of these affirmative defenses were raised in the earlier case. Upon

going to his office on a Saturday, the day after he returned, plaintiff's counsel found the proposed amended answer (83a). The Court may take judicial notice that Monday, October 9, 1972 was a holiday and the trial commenced Tuesday, October 10, 1972.

Defendants' motion, the argument and the Court's ruling appear at pages 78a through 92a. The Court repeats its ruling and its reasoning at pages 181a through 185a, and comments on the issue of diligence and surprise regarding the amended pleading at pages 186a - 189a. The Court, on the ground of surprise, excluded papers offered by defendants relating to the proposed amendments at pages 227a through 236a.

B. Evidence As To The Infringements.

The plaintiff, Rosette, was the sole witness for her case. She testified that she is a resident of New York and a graduate of the Peabody Institute in Baltimore, a music conservatory. For many years she had been both a performer and composer of children's songs and other music (94a - 95a). It is uncontested that Rosette is the composer of all the compositions of the action and subsequently she was the copyright

proprietor of each.

It was conceded by plaintiff at trial that nine of the compositions were mechanically reproduced and the reproductions (phonograph records) were released to the public prior to Rosette's obtaining statutory copyright in the compositions (157a - 158a, 200a - 201a). The remaining twenty-four compositions were registered for copyright prior to mechanical reproduction.

Plaintiff bought the infringing phonograph records in New York (123a, 217a).

Defendant Brown was the only witness for the defense. Brown testified that he was merely the presser of the infringing phonograph records for another party, one Taback, and therefore not liable for infringement.

The Court however, did not believe him, citing evidence:

(1) that in the years 1962, 1963, 1964, 1965 and 1966 defendant Rainbo (Brown's corporation) shared the same telephone number and was listed as having the same address as Lyric Records (the name of the company uncontroversibly responsible for the infringing records)

a fact which Brown on cross-examination, denied or forgot (298a - 300a, 204a - 307a, 361a);

(2) that a letter addressed to "Playtime Records, Inc.", from plaintiff's attorney claiming infringement of the compositions at issue was answered by Brown on the letter-head of his company, "Rainbo Records", saying that the Carousel and Playtime lines (labels on the infringing records) had been inactive for some time (defendants' argument that they were confused about the identification of the compositions was found the Court to be "a bit disingenuous") (300a - 304a, 361a - 364a); and

(3) that Brown failed to produce books or records in support of his claim that he was merely a presser, claiming the loss of these books on flood damage, an explanation he did not give when his deposition was taken three years prior to trial (322a - 237a, 365a).

Judge Gurfein stated in his opinion:

"I find as a fact that there was infringement by the defendants Rainbo and Brown of the plaintiff's compositions which are the subject of suit.

"Despite Brown's testimony, I find that Rainbo was in fact the presser of the records containing the allegedly infringing compositions; that Rainbo did purchase the Carousel and Playtime catalogs; that Rainbo and Lyric were closely related; that the two corporations shared the same mailing address and telephone number and conducted business through such shared address; and that Rainbo and Lyric did act in concert in the conduct of business."

(365a)

ARGUMENT

POINT I

THE COURT BELOW PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANTS' MOTION ON THE FIRST DAY OF TRIAL TO AMEND THE ANSWER BY THE ADDITION OF CERTAIN NEW AFFIRMATIVE DEFENSES.

As related above, in the Statement of Facts, and as amply demonstrated by the record and Appendix thereto cited, plaintiff and her counsel were taken by surprise by the motion to add the three new affirmative defenses. The motion may not have been so much the fruit of defendants' counsel's last minute (six years after commencement of the suit) searches but,

rather, merely a tardy, frantic attempt to develop defenses. For example, Brown's letter (commented upon by Judge Gurfein at 361a - 364a) stating "We have a hold harmless agreement when we purchased the entire catalogue," surely has reference to what were offered as new-found documents, Defendants' Ex. F (id.), at pp. 347a-1 to 347a-3, and Defendants' Ex. M (id.), at pp. 354a-12 to 354a-14.

Judge Gurfein ruling is well supported by law. Under Rule 15(a), F.R.C.P., a pleading can be amended only by leave of the Court. "Although leave is to be given freely it is to be given only "when justice so requires." It is submitted that here defendants' lack of diligence has resulted in prejudice to the plaintiff and that justice clearly required denial of the motion.

The amendment of pleadings by leave of court is within the discretion of the Court. As stated by Professor Moore:

"Allowance of amendments lies in the discretion of the district court, and the allowance or refusal to permit

amendment is not subject to review on appeal except for abuse of discretion;...."
3 Moore's Fed. Prac. 895, § 15.08[4]

Decisions in this Circuit and elsewhere support this statement. Thus this Court found no error in a ruling in the district court denying a motion to assert new affirmative defenses two years after answer. Stiegele v. J. M. Moore, 312 F.2d 588 (2d Cir. 1963)

In Rogers v. Valentine, 426 F.2d 1361 (2d Cir. 1970), on finding that defendants would be prejudiced, this Court affirmed the denial of a motion to amend a complaint to assert a new cause of action one month before trial and one year after entry of the pretrial order. In the instant case, defendant moved on the day of trial one year after entry of the pretrial order (85a).

See Also: Wealden Corporation v. Schvey, 482 F.2d 550 (5th Cir. 1973); Farmers And Merchants Mutual Fire Ins. Co. v. Pulliam, 481 F.2d 670 (10th Cir. 1973); Darcy v. North Atlantic & Gulf S.S. Co., Inc., 78 F.Supp 662 (E.D. Penna. 1948).

The leading case on discretion in deciding motions to amend pleadings under Rule 15(a) is Foman v. Davis, 371 U.S. 178 (1962) cited by defendants. As is clear from the portion of that decision quoted at page 17 of defendants' brief, that undue delay, undue prejudice to the opposition and futility of amendment are justifiable reasons to deny the motion.

POINT II

FINDING THAT DEFENDANTS WERE NOT MERE PRESSERS THE COURT PROPERLY FOUND INFRINGEMENT BY DEFENDANTS

Judge Gurfein, hearing the testimony below and observing the demeanor of the witnesses, found that Brown and Rainbo were closely related to Lyric, that Rainbo and Lyric shared the same addresses and telephones and that they all acted in concert in conducting their business (365a). Defendants seek in Point II of their Brief to reshape the evidence heard at trial claiming the defendants to be "mere pressers" despite the Court's clear and specific findings. The simple argument that the Court erred in not believing defendants' witness does not successfully

demonstrate that Judge Gurfein's findings were
clearly against the weight of the evidence. The
findings below should remain undisturbed.

POINT III

THE DISTRICT COURT CORRECTLY RULED THAT THE MANUFACTURE AND SALE OF THE RECORDINGS OF THE MUSICAL WORKS IN SUIT DID NOT CONSTITUTE A PUBLICATION FORFEITING COMMON LAW RIGHTS IN THE WORKS

As stated by the lower court in its extensive opinion, the above ruling was in accordance with federal decisional law, as well as the practices and understanding of the industry, the bar, the Copyright Office and the U.S. governmental representatives at the Universal Copyright Convention who approved the relevant Article VI accepted and incorporated into the Convention ratified by the U. S. A.

Had the District Court ruled otherwise, namely, that there was a publication divestitive of rights in the works, there would have been unwarranted forfeiture on a vast scale. Countless thousands of works of popular and classical music as well as other works of which recordings have been made and publicly distributed for many years past would have been disastrously and irretrievably cast into the public domain. A court should avoid such construction of the Copyright Act as would produce forfeiture. See

Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 42 (1939).

As stated by Judge Bazelon in Hirshon v. United Artists Corporation, 243 F. 2d 640 (D.C.Cir. 1957):

"The complete revision of copyright law effected by the Copyright Act of 1909 was designed to free authors from burdensome requirements and 'afford greater encouragement' to them. Washingtonian Publishing Co. v. Pearson, 1939, 306 U.S. 30, 36, 59 S.C. 397, 400, 83 L.Ed. 470. Doubtful language in the Act is not to be read in a way to produce forfeitures of copyrights. Id., 306 U.S. at page 42, 59 S.C. at page 403."

See also Baron v. Leo Feist Inc., 78 F. Supp. 686 692 (S.D.N.Y. 1948), aff'd 173 F. 2d 298 (2d Cir. 1949).

POINT IV

HOWEVER, THE COURT BELOW ERRED INsofar AS IT ALSO RULED THAT SUCH WORKS ALTHOUGH UNPUBLISHED AND PROTECTED BY COMMON LAW WERE BEREFT OF MECHANICAL RIGHTS UNTIL AND UNLESS THE OWNER COMPLIED WITH THE FEDERAL COPYRIGHT STATUTE BY OBTAINING A COPYRIGHT AND FILING A NOTICE OF MECHANICAL USE

We submit that such ruling on its face is directly violative of the clear, mandatory provision imbedded in the Act itself.

"§2. RIGHTS OF AUTHOR OR PROPRIETOR OF UN-PUBLISHED WORK. - Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." (Underscoring ours)

The cited cases are legion in support of the doctrine stated by Corpus Juris Secundum as follows:

"Where the language of a statute is plain and unambiguous, there is no occasion for construction, and this is true even though other meanings of the language employed could be found. The court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, or assume a legislative intent in plain contradiction to words used by the legislature, and need not search for the reasons which prompted the legislature to enact the statute.

"An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or restricted to, or confined in operation within, narrower limits or bounds than manifestly intended by the legislature, because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, otherwise the court would be assuming legislative authority. In construing a statute expressed in reasonably clear language, the court should neither read in or read out; and where a law is plain, unambiguous, and explicit in its terms, the exceptions are few indeed that authorize a court to read something into it that the law writers did not themselves put therein.***"

82 Corp Jur Sec, Statutes, Sec. 322, p.
577 et seq

The Supreme Court has stated as to statutes affecting
the common law:

"No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Shaw v. Merchants' National Bank of St. Louis,
101 U.S. 557, 565, 25 L. Ed 872, 894 (1880)

It is plain from Section 2 of the Act that Congress expressly legislated that common law rights in unpublished works were to remain intact and not subordinated to the Federal system unless the owner chose (as he could under Section 12) to avail himself of the federal statute, thereby

subjecting his unpublished musical work to the compulsory license system along with the other benefits and limitations provided or imposed by the federal Act.

Notwithstanding this explicit provision of Section 2, the District Court limited the common law rights in the unpublished musical works in deference to what it believed to be the dictates of the "Sears-Comco doctrine" as enunciated by the Supreme Court in Sears, Roebuck & Co. v. Stiffel Company, 376 U.S. 225 and in Comco Corp. v. Day-Brite Lighting Inc., 376 U.S. 234 (1964). It conceived in effect that there was, by virtue of the 1909 Copyright Act, a federal pre-emption governing mechanical rights in musical works extending, under the Supremacy Clause, to unpublished works otherwise subject to state law.

The reasoning of the District Court in imposing the federal mechanical statutory system upon unpublished musical works not copyrighted under the Act was examined and rejected in Goldstein v. California, 412 U.S. 46, 37 L.Ed 163, 93 S Ct 2302, decided some four months following the decision here below.

In Goldstein, the Supreme Court upheld the validity

of a California penal statute forbidding the duplication of sound recordings for purposes of sale. It found that neither the "Copyright Clause", Article 1, Section 8, Cl. 8 of the Constitution, nor the Copyright Act worked a federal pre-emption covering all writings or works. Instead, the court sanctioned state copyright power over writings which had not been pre-empted under the Federal Copyright Act. Notwithstanding their varying scopes or durations, including perpetuity, of protection or even the absence of any protection at all, the states were held not to be precluded from unpre-empted copyright areas since Congress always retained the copyright power to invade and pre-empt the field in the event the varying or conflicting state systems became unduly prejudicial to national copyright policy. The Sears and Compco cases were distinguished as having no application to the unpre-empted works.

As related to the instant case, we submit that Goldstein, in the light of Article 2, commands a reversal of the lower court's holding requiring statutory copyright compliance for the enforcement of mechanical rights in the unpublished musical works not copyrighted under the Act. Such reversal appears

inescapable because the case sub judice not only involves no discernible federal pre-emption but in fact an express disclaimer of any such pre-emption by the remission in Section 2 of such works to unfettered state control.

The lower court's decision was tantamount to judicial legislation, in that it purported to graft on to state laws that which was by its very nature virtually a form of definitive legislation. This becomes apparent from the fact that the revision legislation which Congress has been considering for many years contains provisions which are in effect the solution which the lower court sought to impose by judicial fiat. See H.R. 2223, 94th Congress, First Session (1975), Section 104a and Section 115.

POINT V.

THE UNPUBLISHED WORKS NOT COPYRIGHTED UNDER THE ACT ARE PROTECTED FROM MECHANICAL INFRINGEMENT UNDER THE APPLICABLE STATE LAW OF NEW YORK

The apprehended infringing sales occurred in New York, where the plaintiff has long resided and where the mechanical rights are sought to be enforced. Since the violation of rights in protected works is a tort (Screen Gems-Columbia Music Inc. v. Metlis & Lebow Corp., 453 F. 2d 552 (2d Cir. 1972); see also Capitol Records v. Mercury Records Corporation, 221 F. 2d 657, 662-663 (2d Cir. 1955)), the lex locus delicti would be that of New York, where the damage or injury substantially occurred and where the rights are sought to be vindicated. The applicable state law would also appear to be that of New York under its recently announced "center of gravity" or "grouping of contacts theory" See Vol. 8, New York Jurisprudence, Conflict of Laws, Sections 25-27, pp. 446 et seq.

New York law protects against the invasion of common law rights. See Capitol Records v. Mercury Records Corporation, supra, where this court held, applying New York law, that the dissemination of records - analogously to the case at bar - was not a publication dedicating rights in the artistic renditions embodied in such records.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED EXCEPT THAT SUCH PART AS DENIES RECOVERY WITH RESPECT TO THE RECORDED COMPOSITIONS FOR WHICH NO COPYRIGHTS HAD BEEN OBTAINED AND NOTICES OF USE FILED SHOULD BE REVERSED AND THE CLAIMS THEREON REMITTED FOR THE DETERMINATION OF DAMAGES AND OTHER RELIEF UNDER THE DIRECTION OF THE DISTRICT COURT. THE COSTS AND DISBURSEMENTS OF THIS APPEAL AND ATTORNEYS FEES OF THIS APPEAL SHOULD BE AWARDED PLAINTIFF-APPELLEE.

Respectfully submitted,

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Received 2 copies of the within
Brief for Plaintiff Appellee
this 13 day of Aug. 1925.

Sign _____

For: Walter Hoffer Esq(s).

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